

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH R. HOLBERG,

Plaintiff,

vs.

COUNTY OF OKANOGAN, JUDGE
JACK BURCHARD, ATTORNEY
ANTHONY CASTELDA and JOY A
HOLBERG-RUSTAN,

Defendants.

NO. CV-10-5095-CI

REPORT AND RECOMMENDATION TO
DISMISS COMPLAINT WITHOUT
PREJUDICE

By Order filed October 27, 2010, the court advised Mr. Holberg of the deficiencies of his complaint and directed him to amend or voluntarily dismiss within sixty (60) days. The court has twice granted Plaintiff extensions of time to comply with that Order. He has not done so.

Plaintiff, a prisoner at the Coyote Ridge Correction Center, is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. In his complaint, Mr. Holberg sought injunctive and declaratory relief for due process violations which allegedly occurred during the course of marriage dissolution proceedings initiated by his former spouse.

1 Plaintiff's claims against his former spouse and her attorney must
2 be dismissed as private individuals are not "persons acting under color
3 of state law" for purposes of 42 U.S.C. § 1983. *Price v. State of*
4 *Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991); *Taylor v. List*, 880 F.2d
5 1040, 1045 (9th Cir. 1989). Plaintiff also failed to adequately allege
6 the County of Okanogan engaged in a pattern or practice that resulted in
7 the deprivation of his constitutional rights. *Gobel v. Maricopa County*,
8 867 F.2d 1201, 1206 (9th Cir. 1989), (citing *Monell v. New York City*
9 *Dep't of Social Services*, 436 U.S. 658, 690-94 (1978)).

10 Finally, Plaintiff failed to allege any facts which would lower the
11 shield of absolute judicial immunity in his claims against Defendant
12 Judge Burchard. *Stump v. Sparkman*, 435 U.S. 349, 357 (1978); *Ashelman*
13 *v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). Accordingly, **IT IS**
14 **RECOMMENDED** Plaintiff's Complaint be **DISMISSED without prejudice** for
15 failure to state a claim upon which relief may be granted. **IT IS**
16 **FURTHER RECOMMENDED** such dismissal count as one under 28 U.S. C. §
17 1915(g).

18 **OBJECTIONS**

19 Any party may object to a magistrate judge's proposed findings,
20 recommendations or report within fourteen (14) days following service
21 with a copy thereof. Such party shall file written objections with the
22 Clerk of the Court and serve objections on all parties, specifically
23 identifying the portions to which objection is being made, and the basis
24 therefor. Any response to the objection shall be filed within fourteen
25 (14) days after receipt of the objection. Attention is directed to FED.
26 R. Civ. P. 6(e), which adds additional time after certain kinds of

1 service.

2 A district judge will make a de novo determination of those
3 portions to which objection is made and may accept, reject, or modify
4 the magistrate judge's determination. The judge need not conduct a new
5 hearing or hear arguments and may consider the magistrate judge's record
6 and make an independent determination thereon. The judge may, but is
7 not required to, accept or consider additional evidence, or may recommit
8 the matter to the magistrate judge with instructions. *United States v.*
9 *Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and
10 (C), FED. R. CIV. P. 72; LMR 4, Local Rules for the Eastern District of
11 Washington.

12 A magistrate judge's recommendation cannot be appealed to a court
13 of appeals; only the district judge's order or judgment can be appealed.

14 The District Court Executive is directed to enter this Report and
15 Recommendation, forward a copy to Plaintiff, and SET A CASE MANAGEMENT
16 DEADLINE ACCORDINGLY.

17 DATED April 11, 2011.

18
19 S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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